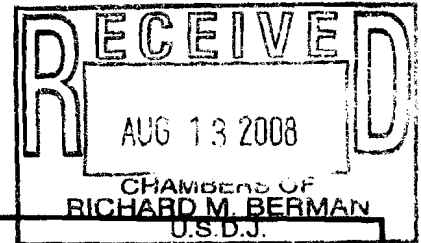


Frederick Henderson
Plaintiff, Pro Se
Din #: 08A0532
Franklin Correctional Facility
62 Bare Hill Road
P.O. Box 10
Malone, NY 12953-0010



MEMO ENDORSED

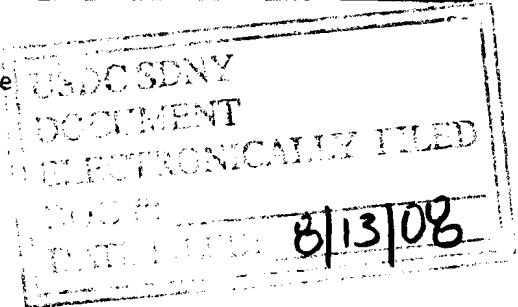
The Honorable Richard M. Berman
United States District Judge
Daniel Patrick Moynihan
U.S. Courthouse
500 Pearl Street, Room 650
New York, NY 10007-1312

SO ORDERED:

Date: 8/13/08

Richard M. Berman
Richard M. Berman, U.S.D.J.

Re: Henderson v. Sommer, et al.,
08 Civ 3440 (RMB) (FM)
Letter In Lieu of a Formal Motion
To Compel The United States Marshals Service
To Serve The Defendants and To Extend The
Time For Service.



Dear Judge Berman,

On July 31, 2008, I, the plaintiff in the above titled action received a copy of a letter sent to your Chambers from Assistant U.S. Attorney Tomoko Onozawa, Esq. of the civil Division of the U.S. Attorney's Office for the Southern District of New York ("SDNY") dated July 28, 2008, stating that the defendants had not been served with the complaint and summons by the U.S. Marshals Service ("USMS"), and therefore, the Government was not authorized to represent the interest of the defendants in accordance with His Honor's Order dated July 14, 2008, directing the parties to appear on September 02, 2008; directing the Government to secure the plaintiff's appearance by phone; and directing both parties to enter into good-faith settlement negotiations.

Plaintiff on the date of June 16, 2008, sent two (2) envelopes to the USMS - SDNY containing in each envelope, complaints and summons for each defendant and other required documents to the defendants and the Government Attorneys, ie. U.S. Attorney General, U.S. Attorney - SDNY, and the assigned AUSA - SDNY Civil Division (Ex. 5). The envelopes were mailed by placing the envelopes in the hands of prison Officials at Franklin Correctional Facility

in Malone, New York at which they were processed through the New York Department of Correctional Services' ("NYDOCS") Advance Request Postage Mailing System. (Ex.'s 1 and 2).

On or about June 30, 2008, plaintiff received an envelope and instructions from the USMS - SDNY, contained inside the envelope were USMS Forms 285's with directions to complete the forms and return such to the USMS -SDNY Office on Pearl Street in Manhattan, even though plaintiff on two separate occasions had sent both the Clerk of Court - SDNY and the USMS - SDNY completed USMS Forms 285's to the proper Government Attorneys and each defendant, plaintiff did comply with the current request, wherefore, on July 09, 2008, plaintiff through the NYDOCS advance request mailing system returned the completed USMS 285's to the USMS - SDNY Office. (Ex.'s 3 and 4)

Plaintiff, who was granted in forma pauperis status, which entitles him to have the USMS serve the complaint and summons under 28 U.S.C. § 1915(d) and the Federal Rules of Civil Procedure, 4(c)(3). and who is a prisoner with limited means of any other way of effecting service. the plaintiff has used dilligence in attempting to have the USMS serve the complaint by: (a) following the Court's direction and instructions given during the conference held on May 01 2008, (TR. of Conf. 05-01-08, pg. 9, LL 12 - 25; pg. 10, LL 1 - 25; pg. 11, LL 1 - 14) directing plaintiff to contact the Pro Se Clerk's Office to wit plaintiff complied. Plaintiff was also in direct contact with the USMS-SDNY Office and did so comply with their instructions at a great monetary expense, from which plaintiff is still recouping from suffering a loss of commissary purchases for necessities.

AUSA Ms. Onozawa mentions in her letter to the Court that plaintiff gives no indication that a waiver of service was sent to the individual defendants. Plaintiff refers to and asks the Court to take Notice that the Manual For Pro Se Litigants Appearing Before The United States District Court For The Southern District, at page 56, ¶ 3 and Instructions To Plaintiff From The Pro Se Office, dated April 25, 2008, (Ex. 6) which clearly state pursuant to the Fed.R.Civ.P., 4(i)(3) that, ". . . if the defendants are the United States, on of its Agencies or Officers." a waiver of service cannot be used. Plaintiff avers that defendants Sommer, M.D.; Sullivan; and Drumheller are all employees of the Federal Bureau of Prisons, a agency of the United States Government, and in their capacities of employment are Federal Officers, thus, qualifying them to the waiver of service exemption under Fed.R.Civ.P., 4(i)(3).

In addition, to the waiver of service issue, plaintiff sued the defendants not only in their individual capacity, but also in their official capacity.

Wherefore, for the aforementioned reasons stated, plaintiff respectfully asks the Court in this Letter In Lieu of a Formal Motion, to Order and compel the United States Marshals Service of the Southern District of New York pursuant to 28 U.S.C. §1915(4)(d). to serve the complaint and summons upon the defendants Diane Sommer, M.D.; Barabara Sullivan; and Jeffery Drumheller at the Federal Correctional Institution Otisville, located at 2 Mile Drive, P.O. Box 600, in the Town of Otisville, in the State of New York, and to also serve the U.S. Attorney for the Southern District of New York, Mr. Michael J. Garcia, Esq. located at One Saint Andrews Plaza, in the City of New York, in the State of New York, and Assistant U.S. Attorney Tomoko Onozawa, Esq., U.S. Attorney's Office, Civil Division, located at 86 Chambers Street, in the City of New York, in the State of New York.

Plaintiff also respectfully asks the Court to direct the Clerk of Court pursuant to the Fed.R.Civ.P., 4(i)(4). to extend the time for service at least 45 days or with the amount of days the Court deems fair and necessary for the USMS to effect service. Zapata v. City of New York, 502 F.3d 192 (2d Cir. 2007); McGregor v. U.S., 933 F.2d 156 (2d Cir. 1991

Respectfully submitted

By: Frederick Henderson
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Franklin Correctional Facility
62 Bare Hill Road
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Malone, NY 12953-0010

DECLARATION UNDER PENALTY OF PERJURY

STATE OF NEW YORK §
COUNTY OF FRANKLIN §

I, Frederick Henderson, Din #: 08A0532, verify under the penalty of perjury that the foregoing is true and correct.

EXECUTED on this the 2nd day of August 2008.

Frederick Henderson